85-795

NO. _____

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

BORIPAT SIRIPAN

Petitioner

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission into evidence of ambiguous tape-recorded telephone conversations in the Thai language between people who had strong motives to distort the truth and who were not available to testify at the trial violated Petitioner's Sixth Amendment Right to confront and cross-examine his accusers.

2. Whether a determination that there was enough evidence of the existence of a conspiracy and of Petitioner's participation in it to allow the admission into evidence of tape-recorded conversations between third parties pursuant to F.R.E. 801(d)(2)(E) was also sufficient to establish the reliability necessary to satisfy the requirements of the Confrontation Clause, or whether a separate inquiry must be made as to reliability, especially where, as here, unusual circumstances exist.

3. Whether tape-recorded telephone conversations between third parties can be admitted into evidence against Petitioner under Rule 801(d)(2)(E) when: (a) one of the parties to the conversations was a government informant and there was no evidence that the other party was a coconspirator other than the conversations themselves; and (b) there was no independent evidence that Petitioner knowingly participated in the conspiracy.

4. Whether the decision below is contrary to prior decisions of this Court that knowledge is a necessary element of participation in a conspiracy.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties herein, Sihadej Chindawongse and Alexander Steubing were co-defendants in the United States District Court for the District of Maryland. The trial of co-defendant Paul Primiano was severed. The appeal of Sihadej Chindawongse was consolidated with that of Petitioner in the United States Court of Appeals for the Fourth Circuit. Alexander Steubing did not appeal his conviction.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	3
Jurisdictional Statement	3
Constitutional Provisions and Statutes	3
Statement of the Case	4
Reasons for Allowance of Writ	7
I. Certiorari Should Be Granted Because The Decision Of The Court Of Appeals Concerning Admission Of The Tape-Recorded Conversations Is In Conflict With Prior Decisions Of This Court Concerning The Right Of An Accused To Confront And Cross-Examine Witnesses Against Him.	7
II. Certiorari Should Be Granted To Resolve The Conflict Among The Circuits Concerning The Relationship Between F.R.E. 801(d)(2)(E) And The Confrontation Clause	11
III. Certiorari Should Be Granted Because The Lower Courts Departed From The Requirements Of Rule 801(d)(2)(E) When The Taped Conversations Were Admitted Into Evidence	15
IV. Certiorari Should Be Granted Because The Decision Below Is Contrary To Opinions Of This Court That Knowledge is Essential To Proof Of Participation In A Conspiracy	18
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES

Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) 8

Boone v. Marshall, 760 F.2d 117 (6th Cir. 1985) 11

California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) 8

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 8

Direct Sales Co. v. United States, 319 U.S. 703, 63 S.Ct. 1265 (1943) 19

Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) 8, 10

Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959) 18

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) 8, 12

Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), cert. den. 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973) 12

Sanson v. United States, cert. den. ___U.S. ___, 104 S.Ct. 3559, 82 L.Ed.2d 861 (1984) 11

United States v. Ammar, 714 F.2d 238 (3d Cir. 1983), cert. den. __ U.S. __, 104 S.Ct. 344, 78 L.Ed.2d 311 (1984) 12, 13

United States v. Broome, 732 F.2d 363 (4th Cir. 1984) 15

TABLE OF AUTHORITIES - (Con't)

	Page
United States v. Bufalino, 285 F.2d 408 (1960) . .	21
United States v. Chase, 372 F.2d 453 (4th Cir.), cert. den. 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626 (1967)	15
United States v. Cherry, 639 F.2d 1335 (5th Cir. 1981)	18
United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985)	14
United States v. Dumas, 688 F.2d 84 (10th Cir. 1982)	16
United States v. Echeverry, 759 F.2d 1451 (9th Cir. 1985)	12, 14
United States v. Fahey, 769 F.2d 829 (1st Cir. 1985).	12
United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975)	18
United States v. Jones, 542 F.2d 186 (4th Cir.), cert. den. 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375 (1976)	15
United States v. Magliano, 336 F.2d 817 (4th Cir. 1964)	16
United States v. Massa, 740 F.2d 629 (8th Cir. 1984), cert. den. 53 U.S.L.W. 3824 (1985)	12, 13
United States v. Monaco, 735 F.2d 1173 (9th Cir. 1984)	8

TABLE OF AUTHORITIES - (Con't)

	Page
United States v. Papia, 560 F.2d 827 (7th Cir. 1977)	11
United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. den. U.S. , 104 S.Ct. 404, 78 L.Ed.2d 344 (1983)	11
United States v. Roberts, 583 F.2d 1173 (10th Cir. 1978), cert. den. 439 U.S. 1080, 99 S.Ct. 862, 59 L.Ed.2d 49 (1979)	12, 14
United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976)	15
United States v. Watkins, 662 F.2d 1090 (4th Cir. 1981)	18
United States v. Wolfe, 766 F.2d 1525 (11th Cir. 1985)	12
United States v. Wright, 588 F.2d 31 (2d Cir. 1978), cert. den. 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d 467	12

RULES

Rule 801(d)(2)(E), Federal Rules of Evidence	Passion
Rule 801, Federal Rules of Evidence	15

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution	Passion

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit has not yet been officially reported. That decision is reproduced in full in the Appendix attached hereto under the caption United States v. Boripat Siripan, Cause No. 82-5266, dated August 28, 1985.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit announced in its opinion on August 28, 1985 and entered on that date. No extension of time to petition for certiorari was sought in this Court. Jurisdiction is conferred upon this Court to review that judgment by writ of certiorari by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's case involves 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), the Sixth Amendment to the Constitution of the United States, and Rules 801(d)(2)(E) and 802, Federal Rules of Evidence, which provisions read as follows:

21 U.S.C. §846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §841(a)(1)

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

Sixth Amendment to the United States - Rights of the accused

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

Rule 801(d)(2)(E)

(d) Statements Which Are Not Hearsay. A statement is not hearsay if–

(2) Admission by party-opponent. The statement is offered against a party and is (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

STATEMENT OF THE CASE

Appellant Boripat Siripan (hereinafter "Siripan") was charged by way of superseding indictment on May 4, 1982 with a single count of conspiracy to distribute and possess with intent to distribute heroin in violation of 21 U.S.C. §846. Indicted as co-defendants were Sihadej Chindawongse, Alexander Steubing, Paul Primiano, George Barton, Viroj Chitmongkollert and Pirom Chongcharoen, who were also charged with distribution and possession of heroin in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Barton, Chitmongkollert, and Chongcharoen were never arrested, and the trial of Primiano was separated.

Trial to a jury of the charges against Siripan, Chindawongse, and Steubing commenced on July 28, 1982, and verdicts of guilty as to all counts were returned on August 3, 1982. Siripan was sentenced on September 14, 1982 to a term of imprisonment for fifteen years and fined $15,000.00.

After numerous delays caused by inability to obtain a transcript and changes in counsel, an appeal was docketed in the Fourth Circuit Court of Appeals, which rendered its decision affirming Siripan's conviction on August 28, 1985.

The indictment arose from a scheme whereby heroin was sent from Thailand to Chicago in diplomatic pouches, where it was retrieved by Chindawongse, a Thai Vice-Consul. Chindawongse would deliver the heroin to Boonyarit Voravithaya, who arranged sale of the heroin. Voravithaya was arrested with a substantial quantity of heroin in Baltimore, Maryland with Steubing. Voravithaya at that point agreed to become an informant for the Department of Justice, Drug Enforcement Administration.

After he became an informant, the DEA tape-recorded a number of telephone calls between Voravithaya and various other people. Of the ones admitted into evidence three were in English; two to Primiano and one to a number in California at the residence from which Siripan was exiting at the time of his arrest. All the rest were in Thai. Seven were to a person in Thailand referred to as "Ang," five were to Chindawongse in Chicago, and one was to Siripan at the Sheraton Squire Hotel in New York City.

In his conversations with Ang, Voravithaya discussed the mechanics of the heroin transactions. Although the conversations were in code, taken in the context of the receipt of heroin from Chindawongse, it was clear that this was the topic under discussion.

In addition to the details of picking up the heroin, arrangements had to be made to send the money made from the sale of the heroin back to Thailand. Voravithaya had originally intended to deliver it himself, but his arrest made this impossible. He gave Ang various reasons for being unable to return himself, and asked that someone be sent over to pick up the money.

During telephone conversations between Voravithaya and Ang on April 13 and 15, Ang said that a friend of his would meet Voravithaya in New York and pick up "60,000" for him, and they discussed the mechanics of the two meeting in the city. Voravithaya also expressed anxiety about the person being followed, but Ang assured him that the friend was "clean." Although he was not mentioned by name in those conversations, the "friend" apparently was Siripan.

Voravithaya and Siripan met at the Sheraton Squire Hotel in New York on April 16, 1982, under DEA surveillance. The

Agents saw Voravithaya (then an informant) make a telephone call, then sit in the lobby. Several minutes later Siripan appeared and met him. The two of them sat in the bar for a few minutes, then got on the elevator alone. A DEA agent testified that he watched the elevator lights go to the ninth floor without stopping. The elevator then continued above the ninth floor, but the agent was unable to say where it stopped after that, whether the occupants got off at the ninth floor, or whether anyone else got on there. Siripan was registered in room 902.

When Voravithaya returned to Baltimore with the DEA agents, he did not have the $60,000 with him that he had taken to New York. There was no direct evidence of what he had done with the money.

Voravithaya died before the trial and Ang was not available to testify as he remained in Thailand.

At the time of his arrest in this matter, Voravithaya was on parole for a heroin conviction in California. In that case, Voravithaya provided information on some of the same people alleged to be participants in this conspiracy and had been placed in the witness protection program. Following his arrest in this matter, he was very concerned about his wife's (or fiance's) safety since she was still in Thailand, and had suggested to the DEA that she should be the one to act as money courier as a way of getting her out of Thailand. The jury was never informed of Voravithaya's first arrest and informant activities, of his participation in the witness protection program, of his original intention to take the money back to Thailand, or of his concern for his wife's safety.

Siripan was arrested on May 2, 1982 as he left a home in California owned by Herb Steinberg. The arresting agent took a diary and address book, a slip of paper, round trip airline tickets between Thailand and the United States, a passport, a California driver's license, and a resident alien card from Siripan. The diary and address books had telephone numbers for Ang in it. A translator testified that the Thai writing on the slip of paper said, "friend from Muangthong Housing Estate has gone to inquire about the stuff intrusted from Huahin." She also said that the word she translated as "stuff" could also mean "thing" or "article."

REASONS A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONCERNING ADMISSION OF THE TAPE-RECORDED CONVERSATIONS IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT CONCERNING THE RIGHT OF AN ACCUSED TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST HIM

In approving the admission of the tape-recorded conversations between Voravithaya and various other individuals, the Fourth Circuit Court of Appeals violated both the letter and the spirit of prior decisions of this Court concerning an accused's right under the Sixth Amendment to confront and cross-examine his accusers.

Although he was never present at the trial, Voravithaya was in fact the government's star witness. It was only through his telephone conversations that the scheme to import heroin was given shape, and it was only through his conversations with Ang that Siripan's actions were given any explanation. Yet the jury never saw Voravithaya and was never exposed to any inquiry into his bias, into the scope of his knowledge of the conspiracy, or of Siripan's involvement therein. Nor could these deficiencies be cured by exposure to and inquiry of the other participant in the conversation, for Ang, too, remained a disembodied voice on a tape machine, a presence felt but never seen at the trial. The jury was not even given the opportunity to make judgments about the participants in the conversations based upon their inflections of speech, for the tapes themselves were in Thai, a language far removed from English. Thus they had to rely upon the translated and written word in evaluating this evidence.

Moreover, although the jury knew that Voravithaya became a government informant after he had been caught with a large quantity of heroin, it never learned that he had a prior conviction for the same kind of activities, that he was still on

parole and facing revocation, that he was under the witness protection program for that earlier work as an informant (including informing on the very same people who sent him to the United States this time), and that he was extremely concerned about his wife's safety. (Appendix, pp. 14-16, 23, 38-39, 54, 56, 61) Because he was not present, the jury was not told that Voravithaya himself was supposed to deliver the $60,000 to Thailand until the arrest made that impossible, and that he suggested to the DEA that his wife be the one to carry the money. (Appendix, pp. 17, 52, 54-55, 59)

The right to confront one's accusers is fundamental to our system of justice. The truth is most likely to emerge through cross examination and face-to-face evaluation of the witness by the jury. The Confrontation Clause of the Sixth Amendment to the United States Constitution assures that a witness's recollection will be tested, his conscience sifted, his story explored, and his demeanor judged. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968). Statements of out-of-court declarants cannot satisfy the prohibition of the Confrontation Clause unless it is first shown that the declarant is unavailable and that the statement is marked with such indicia of trustworthiness that the integrity of the fact-finding process will remain intact. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970).

Here, Siripan concedes that the declarants were unavailable - Voravithaya through death, Ang because of his presence in Thailand, and Chindawongse because of his Fifth Amendment right against self-incrimination. The statements, however, are not sufficiently trustworthy to pass constitutional muster without the illuminating light of cross-examination.

At the time of the conversations, Voravithaya was a government informant, a heroin importer and dealer who had just been arrested with a pound of virtually pure heroin in his possession. He was on parole from a prior conviction for possession of heroin. It was in his best interests to bring as many people into the government's net as he could and to cast

as much blame as possible on others so as to curry favor with the authorities. Compare, e.g., United States v. Monaco, 735 F.2d 1173 (9th Cir. 1984). It was to his advantage to try to make Siripan appear to be a willing participant in an international scheme to bring heroin into the United States. He hoped to save himself and his wife.

Voravithaya was a man who was afforded the protections of the Witness Protection Program and thus given an opportunity to start over but who immediately resumed his old associations in Thailand and plunged anew into heroin trafficking. (Appendix, pp. 20-26)

Ang, for his part, had to deal with an obviously nervous agent who was thousands of miles away. Voravithaya feigned fear that Siripan would be followed (Ex. 14(c), App. pp. 75-76), then was quite upset at the prospect that he and Siripan would not be able to make connections once Siripan was in the United States. Ang was also clearly Voravithaya's superior, giving him directions as to what to do. It was only natural that Ang would try to soothe his underling by telling him that Siripan was a friend and was clean, and that he would reinforce his image of authority and control by using such terminology as saying he was "sending" Siripan to pick up money.

The only sense in which the tapes are "reliable" is that they are an accurate recordation of what was said. That does not mean that what was said was the truth or was the entire story. Because of the absence of either party to the conversations, Siripan was unable to ask, for example, why Voravithaya, who obviously was in the thick of the entire scheme, did not know who Siripan was, when Siripan was allegedly the trusted money courier. Similarly, why was Voravithaya worried about Siripan leaving New York without picking up the money if Siripan's job and purpose in being in the United States was to get money from Voravithaya for Ang? Why did Ang tell Voravithaya not to tell Siripan anything? Why is Siripan never mentioned in any conversations with Chindawongse, another principal character in the scheme?

The tapes present only part of the story, and Siripan was deprived of any opportunity to delve further into that story and develop it. The jury was deprived of any opportunity to

judge the demeanor and presence of these important witnesses, and did not even have the chance to judge nuances of speech, since the tapes were in Thai.

As was said by this Court in Dutton v. Evans, supra, 400 U.S. at 89, 91 S.Ct. at 220:

> "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 339 U.S., at 161, 90 S.Ct. at 1936."

That mission was greatly undermined here, where Siripan was convicted by the testimony of a government informant who never appeared at trial, and whose credibility could not be tested.

Not only could his credibility not be tested, but the conversations between Ang and Voavithaya which mentioned Siripan are themselves ambiguous. It is impossible to tell from them whether Siripan was aware that the money he was to pick up was derived from a drug transaction or whether he was in the United States for other reasons and incidentally agreed to pick up the money. There is no way to know what Voravithaya's testimony might have been concerning Siripan had he been present at trial. It might have been damaging, but on the other hand, it might have cleared him of any wrongdoing.

Allowing the introduction of these conversations into evidence subverted the truth-finding process; it was akin to the trial by affidavit against which the Confrontation Clause was designed to protect. It was contrary to the prior decisions of this Court which have held that an accused must be given the opportunity to confront and cross-examine his accusers. Certiorari should therefore be granted to correct this serious wrong.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE RELATIONSHIP BETWEEN F.R.E. 801(d)(2)(E) AND THE CONFRONTATION CLAUSE

The Fourth Circuit Court of Appeals never independently addressed the Confrontation Clause issue. Rather, it held that, "[s]ince the tape recorded conversations implicating Siripan were properly admitted in evidence under Rule 801(d)(2)(E), their admission does not violate the confrontation clause." (Appendix p. 10).[1] By so deciding, the Fourth Circuit firmly adopted the rule followed by some Circuits that admissibility under Rule 801(d)(2)(E) satisfies the Confrontation Clause and rejected the rule followed in others that separate inquiries are necessary. This result is an erroneous reading of prior cases of this Court, and deprived Siripan of any scrutiny of the Confrontation Clause issues discussed in Part I, supra.

This recurring division among the Circuits is ripe for resolution (see Sanson v. United States, cert. den. ___U.S. ___, 104 S.Ct. 3559, 82 L.Ed.2d 861 (1984), Justice White dissenting), and this case is a particularly good vehicle for its resolution, since the unusual circumstances presented here draw the issue into sharp focus.

The Fifth and Seventh Circuits have clearly adopted the rule that Rule 801(d)(2)(E) admissibility alone assures reliability for Confrontation Clause purposes, United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. den. ___U.S. ___, 104 S.Ct. 404, 78 L.Ed.2d 344 (1983); United States v. Papia, 560 F.2d 827 (7th Cir. 1977), while the Sixth and Eleventh Circuits, have apparently adopted the same rule, but those Circuits also noted in their decisions that there were no unusual circumstances present. Boone v. Marshall, 760 F.2d

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[1] Siripan does not concede that the statements were admissible under Rule 801(d)(2)(E). In light of the Court's ruling, however, he will assume for purposes of this argument only that they were so admissible.

117 (6th Cir. 1985); United States v. Wolfe, 766 F.2d 1525 (11th Cir. 1985).

In 1972, the First Circuit also followed this rationale, but it has recently stated that Rule 801(d)(2)(E) and the Confrontation Clause are not coextensive. Ottomano v. United States, 468 F.2d 269 (1st Cir. 1972), cert. den. 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973); United States v. Fahey, 769 F.2d 829 (1st Cir. 1985). The Second, Third, Eighth, Ninth, and Tenth Circuits all hold that Rule 801(d)(2)(E) does not itself insure compliance with the Confrontation Clause and that a separate inquiry must therefore be made to assure that constitutional requirements have been met. United States v. Wright, 588 F.2d 31 (2d Cir. 1978), cert. den. 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d 467 (1979); United States v. Ammar, 714 F.2d 238 (3d Cir. 1983), cert. den. ___ U.S. ____, 104 S.Ct. 344, 78 L.Ed.2d 311 (1984); United States v. Massa, 740 F.2d 629 (8th Cir. 1984), cert. den. 53 U.S.L.W. 3824 (1985); United States v. Echeverry, 759 F.2d 1451 (9th Cir. 1985); United States v. Roberts, 583 F.2d 1173 (10th Cir. 1978), cert. den. 439 U.S. 1080, 99 S.Ct. 862, 59 L.Ed.2d 49 (1979).

Those Circuits which recognize a distinction between the purposes served by Rule 801(d)(2)(E) and by the Confrontation Clause have correctly analyzed the law; those which equate them are in error. The Fourth Circuit, like the Fifth and Seventh, bases its analysis upon the incorrect assumption that Rule 801(d)(2)(E) is an exception to the hearsay rule. (Appendix, p. 8). From that faulty premise, it reasons that no further inquiry is necessary because, "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, supra, 448 U.S. at 66, 100 S.Ct. at 2539.

Coconspirator statements are not, however, regarded as hearsay, but rather are defined as party admissions by Rule 801(d)(2)(E). Rules 802 through 805 of the Federal Rules of Evidence are concerned with hearsay and its exceptions. Admission of evidence under an exception to the hearsay rule is premised upon a belief that it carries indicia of trustworthiness. Party admissions, on the other hand, are admitted not because they are trustworthy, but because a party cannot

challenge his own veracity. As was said by the Advisory Committee on the Proposed Rules, "[a]dmissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule . . . No guarantee of trustworthiness is required in the case of an admission." See, also, United States v. Ammar, supra, 714 F.2d at 255-56; United States v. Massa, supra, 740 F.2d at 638-39.

In analyzing the Confrontation Clause issue, the Fourth Circuit in this case considered only whether there was independent evidence of a conspiracy and Siripan's participation therein. (It did not consider whether there was independent evidence of participation in the conspiracy by the declarants, a matter addressed more fully in Part III, infra.) No consideration at all was given to the numerous factors which call the trustworthiness of the statements into question.

As discussed in Part I, supra, the conversations were in Thai, thus robbing the jury of the opportunity to evaluate nuances of speech in these cryptic conversations. The jury never learned of Voravithaya's prior conviction and informant activities, or of his concern for his wife's safety. It was impossible to delve into the extent of Voravithaya's knowledge of the scope of and participants in the conspiracy, or to fully explore his powerful incentive to lie or implicate as many people as possible in the conspiracy. The jury was never given an opportunity to physically observe the demeanor of either Voravithaya or Ang. None of these issues have any relevance to establishing a foundation for admissibility under Rule 801(d)(2)(E). They are, however, vital elements to be considered in evaluating the trustworthiness of the statements.

Courts of Appeals, drawing upon decisions of this Court, have suggested factors which are relevant to an inquiry into whether an accused has been afforded his rights under the Confrontation Clause i.e., (1) whether the context or the person to whom the statements were made suggest reliability; (2) whether the declarant had a motive to lie; (3) whether the declarant had personal knowledge of the identity and role of participants; (4) whether the jury had the opportunity to evaluate the credibility of the declarant; (5) whether the

statements are crucial to the prosecution or devastating to the accused; (6) whether the circumstances might provide reason to believe the declarant had misrepresented the accused's involvement; and (7) whether the statements are ambiguous. United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985); United States v. Roberts, supra; United States v. Echeverry, supra.

Because of the Fourth Circuit's short cut around the Confrontation Clause via Rule 801(d)(2)(E), no factors such as these were considered. In the majority of cases, inquiry under Rule 801(d)(2)(E) would encompass all the concerns of the Confrontation Clause. But there are the few, such as the case at bar, where unusual circumstances combine to make a Rule 801(d)(2)(E) inquiry fall short of what is needed to protect an accused's right to confront and cross-examine his accusers. This Court has never tolerated favoring judicial convenience over the rights of an accused. The per se rule adopted by the Fourth Circuit may be easy, and may even be satisfactory in the majority of cases involving coconspirator statements, but it does not protect constitutional rights in those situations where a Rule 801(d)(2)(E) inquiry does not address all of the concerns of the Confrontation Clause.

For this reason, certiorari should be granted to resolve the conflict among the Circuits as to the proper review under Rule 801(d)(2)(E) and the Confrontation Clause, and to clarify that the two do not always share equal concerns.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS DEPARTED FROM THE REQUIREMENTS OF RULE 801(d)(2)(E) WHEN THE TAPED CONVERSATIONS WERE ADMITTED INTO EVIDENCE

Of the sixteen telephone conversations which were introduced into evidence, fifteen were hearsay as to Siripan; none of the parties to those fifteen conversations were available to testify at the trial. Five of the fifteen included conversations relating to Siripan, and these formed the basis of the government's argument that he was a member of the conspiracy to import and sell heroin. There was, however, no independent evidence that the parties to those conversations were members of the conspiracy or that Siripan was a member of the conspiracy. Since they therefore could not have been admitted under Rule 801(d)(2)(E), they should have been excluded under Rule 802 as inadmissible hearsay.

Rule 801(d)(2)(E) allows the admission into evidence of statements by coconspirators only if there has been proof by a fair preponderance of independent evidence of the existence of a conspiracy and of the participation in it by the defendant and by the declarant. United States v. Broome, 732 F.2d 363 (4th Cir. 1984); United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Jones, 542 F.2d 186(4th Cir.), cert. den. 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375 (1976). While there was evidence of a conspiracy, there was no independent evidence of the knowing participation therein by Siripan or Ang. Voravithaya could not be a member of the conspiracy since he was working for the government at the time the tapes were made. United States v. Chase, 372 F.2d 453 (4th Cir.), cert. den. 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626 (1967).

The only eivdence outside the tapes relating to Ang was the listing of his name and telephone number in Siripan's calendar and address book. This alone is hardly sufficient to find him to be a coconspirator by even the slightest standard of proof. Siripan could have had his number for any number innocent reasons. Although the Fourth Circuit acknowledged that Siripan had challenged the independent evidence of Ang's

participation in the conspiracy, (Appendix, p. 5) it never addressed the issue of the declarants' alleged roles. Had it done so, it would have had to rule that the conversations were not admissible into evidence under Rule 801(d)(2)(E).

There is also a paucity of independent evidence of Siripan's participation in the conspiracy. There is no evidence that he carried money to Thailand, or that if he did, he had any knowledge of the purpose of that money. Without knowledge, there can be no intent and no conspiracy to perform an unlawful act. United States v. Dumas, 688 F.2d 84 (10th Cir. 1982); United States v. Magliano, 336 F.2d 817 (4th Cir. 1964).

The independent evidence shows that Siripan met Voravithaya on April 16, 1982 at the Sheraton Squire Hotel in New York City following a telephone conversation to set up the meeting. During that conversation, Voravithaya also gave Siripan a telephone number and urged him to call and say that they had talked. When the two men met at the hotel, they got on the elevator together, and it went to the ninth floor without stopping. It continued up after that. Voravithaya had $60,000 when he went to the hotel, but did not have it when he returned to Baltimore with the DEA agents. (The Court of Appeals opinion states that he did not have it when he returned to the lobby; however, the record merely shows he did not have it in Baltimore.) No one saw him give the money to Siripan.

The evidence also shows that Siripan was in Los Angeles, California on May 2, 1982, when he was arrested, In his possession were an address book and a pocket calendar, both of which had telephone numbers for "Ang" written in them. He also had round trip airplane tickets between Bangkok and Los Angeles and airplane tickets indicating he was in New York City on April 16. There was a slip of paper with Thai writing on it saying that a friend had gone to make inquiries about "stuff," a "thing," or an "article." Finally, there was a telephone bill for the house in California from which he was exiting which showed calls had been made to Bangkok, three of them to the number shown in his address book for "Ang" and which was listed as "M & S Transport Co." The California

telephone was listed under "Herbert Steinberg." There was no evidence as to who made the calls.

This is hardly enough evidence to demonstrate knowing participation by Siripan in a conspiracy to import heroin, even under the "slight connection" standard used by the Fourth Circuit. Even if an inference could be drawn that Siripan had received the money and taken it to Thailand (which Siripan does not concede), there is nothing to suggest that he had any knowledge of what the money was for. He could have been told it was for a legitimate business purpose, or even that it was for some other illegitimate purpose. Siripan's address book and calendar are full of business addresses and telephone numbers in the United States. The calls to Ang's number from the California house, even if made by Siripan, were made to a business number. It is just as plausible to assume that Siripan came to the United States on his own business and that he thought he was picking up the money for legitimate purposes as it is to assume that he knowingly participated in a conspiracy to import heroin.

Both the trial court and the Court of Appeals erred in holding that the taped conversations were admissible as coconspirator statements under Rule 801(d)(2)(E). The Court should therefore exercise its discretion to correct this improper application of Rule 801(d)(2)(E), which application resulted in a denial of due process to Siripan when inadmissible hearsay was used against him.

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS CONTRARY TO OPINIONS OF THIS COURT THAT KNOWLEDGE IS ESSENTIAL TO PROOF OF PARTICIPATION IN A CONSPIRACY

Without the taped conversations, there is no evidence that Siripan participated in a conspiracy to possess and distribute heroin. See Part III, supra. Even if they are taken into consideration, and even if one infers that Siripan received and delivered the $60,000, there is no evidence that Siripan had any knowledge of the purpose of the money. As has long been held by this Court, without knowledge, there cannot be intent to participate in a conspiracy.

The essence of conspiracy is agreement. United States v. Watkins, 662 F.2d 1090 (4th Cir. 1981). As was said in United States v. Cherry, 639 F.2d 1335, 1338 (5th Cir. 1981):

> "It is elemental that in order to prove a criminal conspiracy the government must present direct or circumstantial evidence of an agreement among the conspirators to commit the offense. Circumstantial evidence may support a jury's findings, but there must still be proof beyond a reasonable doubt that the conspiracy existed, that the accused knew of it, and that he intended to join or associate himself with its objectives."

Knowledge is essential to show intent, since conspiracy requires the same intent as the substantive offense. United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959).

> "Without the knowledge, the intent cannot exist. * * * Futhermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference

upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes."

Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S.Ct. 1265, 1269 (1943)

No such clear and unequivocal evidence exists here, even if the telephone calls are considered.

The first time Siripan's existence was mentioned was in the Voravithaya to Ang call of April 12 (Exhibit 14(c) App. pp. 71-78). Voravithaya says that he does not want to return to Thailand, so Ang tells him that a friend is going the next day and will go to New York (App. pp. 71-74). Although it is unclear from this conversation, it appears that they are talking about two separate people going from Bangkok to the United States, for Voravithaya says he needs help, and Ang says he will send Deng. (App. p. 74). Later, they discuss the details of meeting with the man who is leaving the next day, and Voravithaya, who does not know this man, expresses concern that the man will be followed. Ang reassures him, saying, "[t]his guy is very clean." (p. 75).

The conversations between Ang and Voravithaya on April 15 and 16 also show that Siripan did not know the purpose of the money. In conversation number 4 (Exhibit 15(b), App. pp. 89-91), Ang says, "You can be with him when he calls me. . . You don't have to say anything to him," to which Voravithaya responds, "Ok! When I get to him, just pass over the document, right?"

There is no evidence that Voravithaya in fact passed over any money. In order to incriminate Siripan, he could have passed the money to someone else, or simply hidden it elsewhere at the hotel. No one saw him get off of the elevator after he got on with Siripan. He could have continued up. He could have gone to Siripan's room, chatted, then left with the money and stashed it somewhere before going back down.

Although Ang talks about "sending" this person, and says that, "I will tell him to come back immediately" (p. 76) it is apparent from Siripan's actions that he is not under Ang's direction and control (if in fact he is the person referred to in the April 13 conversation). When Voravithaya called Siripan at

the hotel in New York about getting together (Exhibit 15(b), pp. 92-93), Siripan was dismayed that he had to stay overnight, and Voravithaya was concerned that he might not wait for him. Siripan did not have Ang's telephone number, either; Voravithaya had to give it to him. (In Siripan's calendar and address book, Ang's number is written in a different pen than most of the entries and appears to have been added sometime later.) When he left New York, Siripan did not go straight to Bangkok, but instead went and spent some time in California (Exhibit 23(b), conversation No. 3, Appendix, p. 109).

On April 29 and 30, Ang and Voravithaya again conversed, Ang stating that "the same guy" would meet Voravithaya again. (Exhibit 22(b), App. pp. 101-107). This time, however, Voravithaya had to contact and meet Siripan in California. Since none of the other evidence suggests any connection with California, it is apparent that this arrangement was for Siripan's convenience. If he were the trusted money courier, Ang's "man" (as he was characterized repeatedly by the government in closing argument), it hardly seems likely that he would have displayed such independence.

The evidence also affirmatively demonstrates that Siripan had substantial ties with the United States. He had a resident alien's card and a California driver's license, a license that had previously expired in 1979. (Exhibit 33). His address books were full of business addresses in the United States, primarily in California, with a few in the Midwest and Texas. The address book (Exhibit 34) is interesting, for it appears that most of the addresses were written in one pen, as if transferred from an old address book. Only a few entries, including Ang's telephone numbers are in different ink, and appear to have been written more recently.

All of this suggests that Siripan was in the United States for some legitimate purpose, perhaps business, perhaps to visit his family. (In the April 13 conversation, Ang mentioned that Siripan has a wife and children here. Appendix, pp. 75-76) Based upon the evidence, it is just as likely that Siripan had no knowledge that any money he may have picked up was connected to the heroin trade. The only number he knew to call before Voravithaya provided him with another was the

number of M & S Transport Co., a business number. He could have believed that it was for a legitimate business transaction.

If Siripan were Ang's personal courier, he would have known Ang's telephone number and Voravithaya would have known who he was. He would have stayed in New York for whatever period of time it took to connect with Voravithaya without question or complaint. He would have gone immediately back to Bangkok, as Ang apparently wanted him to, rather than lingering in California. On the second trip, he would have gone to New York or Chicago to meet Voravithaya, rather than going to California. (Ang himself was willing to accommodate Voravithaya by arranging a meeting in Toronto rather than Vancouver because it was closer (Exhibit 20(b), Appendix, pp. 95-100).

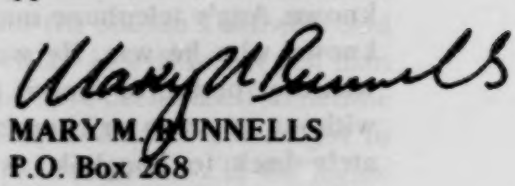
The guilty verdict probably was rendered as to Siripan because the jury was exposed to such overwhelming evidence against his co-defendants Steubing and Chindawongse. Pounds of heroin were passed to the jury, and the prosecutor made an impassioned plea for a guilty verdict against people who would traffic in such a drug in such quantities. As the Second Circuit Court of Appeals said, however, in United States v. Bufalino, 285 F.2d 408, 417 (1960), it is "improper to permit the jury to substitute a feeling of collective culpability for a finding of individual guilt." To prevent that from happening, "it is incumbent on trial judges to analyze with meticulous care the evidence as to each defendant." 285 F.2d at 418.

That meticulous scrutiny was absent here and it resulted in an improper finding of guilt as to Siripan.

Because the result is contrary to the decisions of this Court in United States v. Feola, supra; Ingram v. United States, supra, and Direct Sales Co. v. United States, supra, certiorari should be granted and the judgment of conviction set aside.

CONCLUSION

For all of the reasons set out herein, a writ of certiorari to the Fourth Circuit Court of Appeals should be allowed.



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